BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF:

CASE NO. 98-11

[redacted]

VS.

METRO DAVIDSON COUNTY SCHOOL SYSTEM

OPINION

James Stephen King
Administrative Law Judge
1661 International Place Drive
Suite 300
Memphis, TN 38120
(901) 767-1234

May 19, 1998

OPINION

NO. 98-11

A Due Process Hearing was held on May 7 and 8, 1998 before James Stephen King sitting for the Tennessee Department of Education. The issues of the due process hearing were (i) whether the extended school year program offered by the school system should be provided at the YMCA Summer Fun Program and (ii) whether the extended school year offered by the school system was adequate in amount of services offered.

1. SCHOOL SYSTEMS IEP

The extended school year program offered by the school system in its IEP dated March 12, 1998 consisted of special education instruction by a special education teacher for 3 hours per week over the summer, occupational therapy for 3 hours over the summer and compensatory speech language for 3 hours over the summer. The services were to be provided either in the home or at Moss Elementary School, with the parents to make the choice between the two locations.

2. CHILD'S PROPOSED SUMMER PROGRAM

The child was represented at the due process hearing by the mother, grandmother and great-grandmother. They believe that the child's success in the 1998-1999 school year will be dependent upon a summer program getting the child ready for the upcoming year. They feel the child needs contact with normally developing peers to improve the child's communication and social skills. They also contend that without normally developing peers to mimic the sisters will mimic each other over the summer and the child will regress in speech and language. The parents request that the

school system enroll the child in the YMCA Summer Fun Program, as was provided in the previous year.

FINDINGS OF FACT

The child is 7½ years old and is enrolled in kindergarten for the 1997/1998-school year. The child suffers from Downs syndrome and is certified for special education as mentally retarded and language impaired. The child has a younger sister who suffers from Downs syndrome and another sibling who is 3 years old.

During the 1997/1998 regular school year, the child spent most of her day in a mainstream regular educational kindergarten classroom with an aide. The child also received occupational therapy and speech language therapy.

During the 1997/1998 regular school year, the child developed an intestinal blockage and was ill from November 12, 1997 until February, 1998. The record was unclear as to exactly how much time the child missed during her illness. The special education teacher testified that the child attended sporadically in November and December, 1997 and then had surgery during January, 1998. Because the child was attending sporadically, the child was not placed on homebound instruction. Further, the school system testified that they generally receive a request from the physician or parent for homebound instruction when the child is to be out for an extended period of time. During February, 1998, the school system received the request for homebound instruction and an IEP was developed to provide homebound instruction to the child. The child returned to school in March of 1998.

The parent had the child examined by Denise Bryant, a certified speech language pathologist with the Bill Wilkerson Center, on May 30, 1997. Ms. Bryant recommended year round speech language therapy to be provided by the speech language pathologists and stated that the child needed

to be around normally developing peers; however, Ms. Bryant could not testify whether a summer program would be necessary to prevent regression.

The child's kindergarten teacher, Ms. Peeples, testified that the child works with the same material as other children, such as scissors, paper, etc., but that the curriculum is modified to address the child's disability. Ms. Peeples testified that the child's social and living skills improved over the year but that she continued to have problems with the child's refusal to participate in directed activities, Ms. Peeples also expressed concern regarding the child's academic progress. Ms. Peeples also observed that after returning from her illness, the child had physically regressed in that she was weaker and somewhat withdrawn, which Ms. Peeples attributed to her physical weakness; however, her academic progress did not change.

The child's special education assistant, Ms. Thompson, who only starting working with the child after returning from her illness testified that the child works better with the aide alone and performs better in a quiet environment.

The great-grandmother who is a retired teacher with Metro School System with over 25 years of experience and a doctorate, testified that she felt that the child needed a comprehensive year-round program, including the YMCA program; however, the great-grandmother did not address the issue of regression but stated that she felt that it was children with these types of disabilities required continuous services. She also made one comment which the Administrative Law Judge fully agrees with that it is better to spend money that is necessary to train the children while they are younger, rather than trying to wait until the children are older, when it will cost even more to educate the child.

Ms. Lee's, Metro's speech language pathologist, testified that the child would not communicate at all at the beginning of the year but now will interact more appropriately. She stated

that the child seemed to make more progress in the pullout sessions where there was a controlled environment with fewer distractions. Ms. Lee agrees with the recommendations from the Bill Wilkerson report and recommends a total communication approach to be implemented by the special education teacher during the summer.

The special education teacher, Ms. Garrett, is in charge of the child's program. She consults with the kindergarten teacher and the speech language teacher every week and provides modified materials for the child's use in the classroom. Ms. Garrett testified that one of the major areas of concern with the child was the child's resistance to instruction and that she was uncooperative.

Ms. Garrett stated that the reason for the summer IEP was because the child was out of school because of illness. The summer IEP goals will be the same IEP goals that were included in the regular school year's IEP. Although the child spent more total hours in school during the regular school year, Ms. Garrett testified that 3 hours per week of direct services from the special education teacher is more than the child received in the regular school year. Therefore, she feels that the proposal for 3 hours of special education services in the summer IEP is appropriate. In fact, she testified that she believed that this was the "optimum" program for the child.

Ms. Garrett further testified that she does not believe the YMCA Summer Fun Program is appropriate for the child. She stated that she is familiar with the program and it is inappropriate because it has a large number of children in each class which will be overwhelming to the child. Ms. Garrett felt that the child would be overstimulated which would distract from her program. In addition, Ms. Garrett stated that the staff consists mainly of high school students who are inexperienced and cannot properly implement the IEP. Ms. Garrett also opined that the child's biggest difficulty was in academics and not social interaction. Therefore, the summer program should stress academics.

CONCLUSIONS OF LAW

A. When is a Child Entitled to Extended School Year.

A child is entitled to an extended school year if would be not merely beneficial but a necessary component of an appropriate education for the child. Cordrey v Euckert, 917 F. 2d 1460 (6th Cir. 1990). ESY is appropriate if it would prevent significant regression of skills or knowledge retained by the child so as to seriously affect her progress towards self-sufficiency. Id.

The Cordrey court noted that providing an extended school year is the exception and not the rule under the regulatory scheme. Given those policy considerations therefore, it is incumbent upon those proposing an ESY for the inclusion in the child's IEP to demonstrate, in a particularized manner relating to the individual child, that an ESY is necessary to avoid something more than adequately recouperable regression. Id.

B. Standard for Reviewing the Summer IEP.

In the case at hand, the parties agree that ESY is necessary; however, the content of the ESY program and the location of delivery of services is at issue. The test for reviewing a proposed summer IEP is whether the proposed IEP will prevent regression which cannot be adequately recouped in the following school year.

C. Proving Regression.

The Cordrey court held that regression may be shown in two ways. (1) Regression may be demonstrated by showing that the child has regressed in the past to the serious detriment of his educational progress. (2) Where no empirical data available, the need for summer services may be proven by expert opinion based upon a professional individual assessment.

1. Empirical Evidence of Regression. In this case, there is no proof in the record of past non-recouperable regression. During the school year, the child was ill and missed many classes

while recovering from the illness. Upon returning to the classroom, the teacher noticed that the child was somewhat withdrawn but that her academics had not changed. There was also testimony that the child's speech actually improved once she returned from the illness. The evidence does not establish empirical data showing nonrecouperable regression.

2. Expert opinion of regression. The parent offered Ms. Bryant as an expert in speech language; however, Ms. Bryant could not give testimony regarding the proposed summer program because she had not reviewed it. The only proof in the record is from the school system's witnesses who testified that the program offered by the school system was appropriate for the child. Ms. Garrett testified that the child would receive more direct services from a special education teacher than during the regular school year. Ms. Lee testified that the total communication instruction should be implemented by the special education teacher. Ms. Garrett further testified that the program was the optimum program for the child. The Parent never offered expert testimony to rebut the school system's assertion, nor to show that the child would suffer regression under the school system's proposed IEP.

D. Refusal to provide the YMCA Summer Fun Program was appropriate.

The parent did not offer sufficient evidence to establish that the YMCA Summer Fun Program was necessary to prevent regression over the summer. The School System offered unrebutted evidence that the YMCA Summer Fun Program was inappropriate.

Ms. Garrett testified that the YMCA Summer Fun Program was not appropriate for the child. She testified that the staff was inexperienced and consisted of many high school students and that the child risked being overstimulated because of the large class size. The appropriateness of the large classes at the YMCA was further supported by other witnesses who testified that the

child did better in an one-to-one environment or in small groups. The evidence established that the YMCA Summer Fun Program was not appropriate for the child during the summer of 1998.

E. School System proposed IEP provides FAPE.

The parent failed to provide any expert testimony that the child needs summer services, in addition to those offered by the school system, to prevent regression over the summer. Mrs. Garrett testified that the school system proposed IEP provide an "optimum" program. The other school system's witness testified that the school system's summer program met the child's needs. Therefore, based upon the record, the proof establishes that the extended school year program offered by the school system provides a free appropriate public education.

F. Lack of services during illness.

Although not identified as an issue by the parties, the testimony raised an issue regarding why no services were provided to the child from November, 1997 until February, 1998. Mrs .Garrett testified that the school system generally does not provide homebound services to a child until they get a request from a parent or the child's doctor. Ms. Garrett testified that the child had attended school off and on from November 12, 1997 through December, 1997. Since the child was attending school on a sporadic basis, the school system did not offer homebound instruction. It was Mrs. Garrett's understanding that during January, 1998 that the child underwent surgery and was in critical condition and unable to receive any instruction. In February, 1998, once the child had made recovery, the school system did hold a M-Team meeting at the parent's request and develop a homebound IEP for the child. Based on this record, it is almost impossible to determine whether there are any violations of the IDEA for failure to provide services during the child's illness because the attendance records were not introduced and the record is sketchy, at best, regarding how much time the child spent at school during her illness.

CONCLUSION

The record does not establish that the summer IEP proposed by the school system is inappropriate. The school system is not required to provide a program that maximizes the child's potential but is only required to provide a program which provides some educational benefit to the child. Board of Education v Rowley, 458 U.S. 176 (1982). In this case, the school system has established that its program is appropriate to prevent significant regression of skill or knowledge retained by the Child and therefore complies with the requirements of the IDEA, 20 U.S. C. 1400 et. seq.

The school system is the prevailing party.

This decision shall be binding upon both parties unless this decision is appealed. Any party aggrieved by this decision may appeal to the Chancery Court of Davidson County, Tennessee or seek review in the United States District Court for the District in which the school system is located. Such appeal or review must be sought within 60 days from the date of the entry of a final order in a non-reimbursement case or three years involving educational costs and expenses. In appropriate cases, the reviewing court may order that the final order by stayed pending appeal.

JAMES STEPHEN KING
ADMINISTRATIVE LAW JUDGE

DATED: May 19, 1998

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document has been sent by postage prepaid mail, this the 19th day of May, 1998, to the school system and the Child.

James Stephen King

ATTACHMENT

~~ATTORNEY FOR~~ PARENTS:

[redacted]

ATTORNEY FOR SCHOOL SYSTEM

Mary Johnston, Esquire
204 Metro Court House
Nashville, TN 37201
(615) 862-6341

ADMINISTRATIVE LAW JUDGE:

James Stephen King
1661 International Place Drive
Suite 300
Memphis, TN 38120
(901) 767-1234
(901) 767-4010 Fax

Division of Special Education
Tennessee State Department of Education
8th Floor, Gateway Plaza
710 James Robertson Parkway
Nashville, TN 37243-0380

[redacted]